**IN THE UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

STARR INDEMINITY & LIABILITY
COMPANY

*Plaintiff*, CASE NO.: 13-CIV-8580

v.

BRIGHTSTAR CORP., and
BRIGHTSTAR GERMANY GmbH

*Defendants*,

and

BRIGHTSTAR CORP.

*Counter-Plaintiff*,
v.

STARR INDEMINITY & LIABILITY
COMPANY

*Counter-Defendant.*
_______________________________________/

## AMENDED ANSWER, AFFIRMATIVE DEFENSES AND COUNTERCLAIM

Defendants Brightstar Corp. (“Brightstar”) and Brightstar Germany GmbH ( “Brightstar Germany”)(collectively “Brightstar”), by and through their undersigned counsel, file the following Amended Answer and Affirmative Defenses to Starr Indemnity & Liability Company’s (Starr) Complaint for Declaratory Judgment, and Counterclaim in response to Starr’s Complaint for Declaratory Judgment, as follows:

**AMENDED ANSWER**

**PARTIES**

1. Denied.

2. Defendant is without knowledge at to the allegations contained in this paragraph.

3. Admitted.

4. Admitted.

5. Admitted.

**JURISDICTION AND VENUE**

6. Admitted.

7. Admitted.

8. Admitted.

9. Admitted.

10. Denied.

11. Denied.

12. Denied.

**UNDERLYING FACTS –**
**BRIGHTSTAR'S CONTRACTS WITH NEW YORK**

13. Admitted.

14. Admitted.

15. Admitted.

16. Denied.

17. Denied.

18. Defendant admits that Marsh was the insurance broker for Brightstar Corp. only from March 2011 to April 2012. The remaining allegation is denied.

19. Defendant admits that that Arthur J. Gallagher & Co. ("AJG") is an insurance broker for Brightstar Corp. only. The remaining allegation is denied.

20. Defendant is without knowledge as to the allegations contained in this paragraph.

21. Denied.

**UNDERLYING FACTS – THE INSURANCE POLICY**

22. Defendant admits Starr issued Policy Number MASICNY0154US13. Defendant denies that this policy is applicable to the subject loss.

23. Admitted.

24. Admitted.

25. Defendant admits that the allegations in paragraph 25 are an accurate representation of the language found in Endorsement No. 40.

26. Denied as phrased.

27. Defendant admits that the allegations in paragraph 27 are an accurate representation of the language found in Endorsement No. 36.

28. Defendant admits that the allegations in paragraph 28 are an accurate representation of the language found in Endorsement No. 42.

**UNDERLYING ACTS- THE INSURANCE CLAIM**

29. Admitted that Brightstar Germany and Getgoods are parties to a Master Agreement for Performance of Logistic Services, which agreement speaks for itself; to the extent these allegations conflict with the language of the agreement, they are otherwise, denied.

30. Admitted that Brightstar Germany and Getgoods are parties to a Distribution Contract, which agreement speaks for itself; to the extent these allegations conflict with the language of the agreement, they are otherwise, denied.

31. Admitted.

32. Admitted.

33. Admitted.

34. Admitted.

35. Admitted.

36. Admitted.

37. Admitted.

38. Admitted.

39. Defendant is without knowledge as to the allegations contained in this paragraph.

40. Defendant is without knowledge as to the allegations contained in this paragraph.

41. Defendant asserts that its products were stolen from the warehouse without its knowledge or consent. The remaining allegations are denied.

42. Admitted.

43. Denied.

44. Defendant admits that it is making a claim under a policy issued by Plaintiff to Defendant. The remaining allegations are denied.

45. Admitted.

**AS AND FOR A FIRST CAUSE OF ACTION**

46. Brightstar repeats and re-alleges its responses to the allegations of Plaintiff's Complaint paragraphs one (1) through and including forty-five (45) as if fully set forth herein.

47. Endorsement No. 40 speaks for itself.

48. Denied.

49. Denied.

50. Denied.

51. Denied.

52. Denied.

**AS AND FOR A SECOND CAUSE OF ACTION**

53. Brightstar repeats and re-alleges its responses to the allegations of Plaintiff's Complaint paragraphs one (1) through and including fifty-two (52) as if fully set forth herein.

54. Endorsement No. 40 speaks for itself.

55. Denied.

56. Denied.

57. Denied.

58. Denied.

59. Denied.

**AS AND FOR A THIRD CAUSE OF ACTION**

60. Brightstar repeats and re-alleges its responses to the allegations of Plaintiff's Complaint paragraphs one (1) through and including fifty-nine (59) as if fully set forth herein.

61. Denied.

62. Admitted.

63. Endorsement No. 42 speaks for itself.

64. Defendant is without knowledge as to the allegations contained in this paragraph.

65. Denied.

**AS AND FOR A FOURTH CAUSE OF ACTION**

66. Brightstar repeats and re-alleges its responses to the allegations of Plaintiff's Complaint paragraphs one (1) through and including sixty-five (65) as if fully set forth herein.

67. Endorsement No. 40 speaks for itself.

68. Brightstar is without knowledge as to this allegation.

69. Brightstar is without knowledge as to this allegation.

70. Brightstar is without knowledge as to this allegation.

71. Brightstar is without knowledge as to this allegation.

72. Brightstar is without knowledge as to this allegation.

73. Denied.

74. Brightstar is without knowledge as to this allegation.

75. Defendant is without knowledge as to this allegation.

76. Brightstar is without knowledge as to this allegation.

77. Brightstar is without knowledge as to this allegation.

78. Denied.

79. Brightstar is without knowledge as to this allegation.

80. Denied.

81. Denied.

82. Brightstar is without knowledge as to this allegation.

83. Denied.

84. Denied.

85. Denied.

## AFFIRMATIVE DEFENSES

***First Affirmative Defense***
**Ambiguities**

As its First Affirmative Defense, Defendants state that Starr may not disclaim its obligations under the policy because of certain ambiguities in the policy drafted by Starr and issued to Brightstar, including but not limited to Endorsements Nos. 2 and 40, and the deductible provision. Such ambiguities must be interpreted under governing law in favor of coverage.

***Second Affirmative Defense***
**Failure to State a Cause of Action**

As its Second Affirmative Defense, Defendants state that Starr's Complaint fails to state a claim for which relief can be granted.

***Third Affirmative Defense***
**Recoupment of Defense costs**

As its Third Affirmative Defense, Defendants state that Starr is not entitled to recoup costs incurred in the Underlying Actions.

***Fourth Affirmative Defense***
***Waiver and/or estoppel***

As its Fourth Affirmative Defense, Defendant states that Starr has waived and/or is estopped from asserting that the subject warehouse does not meet the minimum standard since it failed to order a loss control survey upon being notified of the new location.

**Fifth Affirmative Defense**
***Illusory Coverage***

As its Fifth Affirmative, Brightstar Germany asserts the subject coverage issued by Starr is illusory and must be construed in its favor.

**JURY DEMAND**

The Defendants demand a trial by jury on all issues so triable.

WHEREFORE, having answered the Complaint filed by Starr Indemnity & Liability Company and having asserted Affirmative Defenses thereto, Defendants, Brightstar Corporation and Brightstar Germany GmbH, respectfully request that this Court enter judgment in their favor against the Plaintiff Starr Indemnity & Liability Company, award Brightstar Corporation and Brightstar Germany GmbH fees and costs incurred in defending same and any other relief this Court finds equitable, just and proper.

***

**COUNTERCLAIM**

Defendant Brightstar Corporation ("Brightstar") asserts the following Counterclaim against Starr Indemnity & Liability Company ("Starr"), as follows:

**JURISDICTION, VENUE AND PARTIES**

1. This declaratory judgment action arises out of an insurance policy issued by Starr to Brightstar Corporation. Policy number MASICNY0154US12 was effective from March 26, 2012 through March 26, 2013 ("Policy.")

2. The amount in controversy exceeds $75,000.00, exclusive of attorneys' fees, interests, and costs, and this Court has diversity jurisdiction over this action pursuant to 28 U.S.C. §1332, as this action is between citizens of different States.

3. This action is filed under and pursuant to the federal Declaratory Judgment Act, 28 U.S.C. §2201.

4. At all material times, Counter-Plaintiff Brightstar was incorporated under the laws of the State of Delaware, with its principal place of business located at 9725 NW 117 Ave, Miami, Florida.

5. Brightstar does not own any warehouses, does not directly advertise, sell or offer for sale any products in the state of New York.

6. At all material times, Counter-Defendant Starr was incorporated under the laws of the State of Texas, with its principal place of business in the Dallas, Texas. [See 2012 and 2013 For Profit Corporate Annual Reports filed with the state of Florida attached as Composite Exhibit "A."] Starr is licensed to and does issue insurance policies in the state of Florida.

7. The policy which is the subject of this lawsuit was obtained by Brightstar through Arthur J. Gallagher Risk Management, an Illinois Company, through its offices located at 8200 NW 41 Street, Miami, Florida. All transactions relative to the subject policy between Brightstar and Gallagher occurred within the state of Florida.

8. The quote for the policy which was issued by Starr was ultimately accepted by Brightstar in Miami, Florida.

9. The initial deposit for the premium was paid by Brightstar to Gallagher in the state of Florida.

10. Per the language of the policy, all premiums and taxes were to be invoiced to and paid by Brightstar Corporate which is located in the state of Florida.

11. The premium for the insurance policy was financed through BankDirect Capital Finance whose office is located in Lake Forest, IL. There were no payments made directly by Brightstar to Starr in the state of New York.

**THE POLICY**

12. This case arises out of an insurance policy issued by Starr to Brightstar Corp. The merchandise which was owned by Brightstar and the subject of this lawsuit was warehoused in Germany at Werner-von-Siemens-Straße 6/Quinckestraße 1, 15236 Frankfurt (Oder) ("German Location") in a facility owned and controlled by getgoods.de Vertriebs Gmbh ("Getgoods").

13. Pursuant to Endorsement No. 17, the Policy contains the following relevant provisions:

> This policy, subject to all terms and conditions, and in consideration of additional premium to be paid at rates as hereinafter provided, is hereby extended to cover goods and merchandise which are owned by or held by the Assured in trust, or on commission or consignment or otherwise held or sold but not delivered or removed, or on joint account with or belonging to others, and for which the Assured may be liable in the event of loss, while temporarily detained in stores or warehouses, at any location worldwide.
>
> Attaching on all goods and merchandise as described above at the risk of the Insured on or after March 26, 2012.[1]
>
> ***
>
> Automatic coverage up to $25,000,000 ($50,000,000 for Brightstar/Tech Data Europe locations) is provided for new locations upon an affirmative representation of specific

[1] Starr alleges in its Complaint that Brightstar began its German operations on March 1, 2013 but nonetheless erroneously maintains that the subsequent policy applies to this loss. [See paragraph 31 of Starr Complaint.] Pursuant to the language of the subsequent policy (March 26, 2013 through March 26, 2014), it applies to "all goods and merchandise as described above at the risk of the Insured on or after March 26, 2013. The subsequent policy would only apply to merchandise which was at the risk of the insured subsequent to March 26, 2013.

location minimum standards noted below, subject to receipt of quarterly statement of values.

**STARR HAS NOTICE OF THE GERMAN LOCATION**

14. From March 26, 2011 through April 26, 2012, Marsh Risk & Insurance Services served as the broker for the policies of insurance issued by Starr to Brightstar.

15. Pursuant to the plain language of the policy below, Marsh had actual and/or apparent authority to bind Starr. To this end, the policy provides in relevant part:

> **NOTICE OF LOSS**: The insured shall report to (i) Marsh Risk & Insurance Services for transmission to This Insurer…

16. On or about January 10, 2012, Arthur J. Gallagher ("AJG") succeeded to the role occupied by Marsh.

17. Accordingly, AJG had actual or apparent authority to act as the agent of Starr Indemnity pursuant to the aforementioned provision in the Starr policy.

18. In January 2013, Brightstar Germany is formed. Brightstar Germany enters into a logistics agreements and a distribution agreement with Getgoods. Pursuant to the agreements, Getgoods would own, control and operate the warehouse which would house Brighstar's merchandise.

19. In February 2013, negotiations began to renew the subject insurance policy.

20. In accordance with the renewal process, on February 20, 2013, Starr's agent, AJG began working with Brightstar to secure coverage in general and that for its operations in Germany.

21. This occurred through direct contact by Brightstar with Germany as well as through communications with Starr's agent, AJG.

22. On February 20, 2013, Kevin O'Brien ("O'Brien"), Director of Global Security & Loss Prevention for Brightstar contacted Peter Scrobe ("Scrobe") of Starr Indemnity and advised him that Brightstar would begin operations in Germany at the end of February.

23. O'Brien provided Scrobe (who already knew the operations were in Frankfurt) with the address of the warehouse and the point of contact for Brightstar Germany. O'Brien further requested that Starr perform the loss control survey prior to his visit in March.

24. Per the instruction of Jeff Factor of Starr, Brightstar provided Starr's agent, Robin Thompson of AJG, with revenue projections broken down by country.

25. The spreadsheet provided to and received by Star unequivocally advised Starr that Brightstar was operating in Germany.

26. Furthermore, Brightstar operated exclusively through the use of the warehouse which is the subject of this litigation.

27. This spreadsheet received by Starr further contained estimated revenue projections for the German location in the amount of $113.9 million and an estimated gross revenue projection for Brightstar's entire portfolio.

28. To be sure, the estimated gross revenue in the amount of $8,581.1 million included the German operations and formed the basis of the quote which was ultimately provided to and accepted by Brightstar in March 2013.

29. Endorsement No. 36 which is based on those figures and provides in pertinent part:

**Renewal Premium and Rate Endorsement**

| | Values | Rate | Deposit Premium |
|---|---|---|---|
| Marine/War/SRCC | 8,581,100,00 | 0.021 | 1,800,00 |

30. Significantly, the quote further provided that a Rate of .075 plus CAT surcharge has been added to the quote for new locations not currently on the schedule and that the insurance policy would not be rated or adjusted based on data in the Quarterly SOV.

31. On February 21, 2013, Enrique Rodriguez of Brightstar provides a COPE worksheet with the German location to Starr by and through its agent, Robin Thompson of AJG, with values in $40 million.

32. On that same day, Robin Thompson acknowledged receipt of the COPE worksheet.

33. On March 7, 2013, Kevin O’Brien, Klaus Freese and Axel Grellhorst conduct an onsite, security assessment of the Getgoods facility and confirm that the Getgoods location complies with the minimum requirements in its insurance policies.

34. Although Starr had been requested to do so, Starr failed and/or refused to conduct the loss control survey in accordance with its obligations under the policy.

35. By March 13, 2013, Brightstar provided Starr, through its agent, Gallagher with a Master Schedule and a European Schedule containing the names, address and stock inventory of the warehouses within Brightstar’s portfolio, as well as an affirmative representation of specific location minimum standards as to each location as required by the policy.

36. The German Location was listed in the Master and European spreadsheets.

37. On March 23, 2013, Brightstar revised the COPE to increase the value of the merchandise in the German Location to $75 million dollars.

38. The revised COPE spreadsheet was provided to Starr by and through its agent, Robin Thompson of AJG.

39. Accordingly, prior to the inception of the new policy and the date of loss Starr received notice of the German location directly from Brightstar, directly from its agent, Star and indirectly through communications between Brightstar and its agent, AJG.

40. Thus, at the time of the renewal of the policy on March 26, 2013, the German location was a scheduled location.

**THE LOSS**

41. At the time the wireless communication devices were stolen, they were being stored at the German Location pursuant to a Master Agreement for Performance of Logistics Services (“Logistics Agreement”) between Brightstar Germany GmbH (hereinafter “Brightstar Germany”) and Getgoods.

42. The Logistics Agreement provides for third party logistics services to be performed by Getgoods with relation to Brightstar’s wireless communication devices. The Logistics Agreement was valid for a term of six months from January 31, 2013 and was subsequently extended automatically for six (6) months.

43. Pursuant to the Logistics agreement, Getgoods owned and controlled the warehouse, performed the transport services and haulage handling for the merchandise, dealt with all custom measures and received the merchandise directly from Samsung, the manufacturer of Brightstar’s merchandise.

44. Brightstar’s logistic protocol called for a stock take twice a year.

45. On August 31, 2013, Brightstar wanted to perform a stock take at Getgoods' warehouse. Getgoods did not allow Brightstar to perform a stock take at that time but did agree to make the warehouse available on September 30, 2013.

46. Prior to the September 30, 2013, Getgoods again advised Brightstar that an inventory could not be performed on the scheduled date and again rescheduled the date to October 31, 2013, which was again cancelled by Getgoods.

47. Following the third cancellation, Brightstar proceeded to the warehouse in order to verify that its stock was, in fact, in the warehouse on October 30, 2013.

48. With the permission of Getgoods, Brightstar conducted random checks of approximately 20 pallets, and the cartons contained within, revealed Samsung Galaxy wireless communication devices belonging to Brightstar.

49. Based upon the number of pallets, cartons per pallet, and devices per carton, Brightstar calculated approximately 193,000 wireless communication devices were present at the Getgoods' warehouse on October 30, 2013, which was consistent with Brightstar's warehouse inventory reports.

50. Getgoods agreed to allow Brightstar to take a full stock take at its warehouse on November 8, 2013.

51. On November 7, 2013, one day prior to the stock take, Brightstar was informed that its stock at the Getgoods was illegally misappropriated by Getgoods' CEO, Markus and or fraudulently sold without Brightstar's permission.

52. Brightstar immediately contacted the German authorities and a criminal investigation is currently pending in Germany.

53. Brightstar's damages as a result of this loss are approximately €54,000.000 or $75 million dollars.

54. Brightstar tendered the claim to Starr and Starr issued a reservation of rights but made no coverage determination.

55. Notwithstanding its failure to make a coverage determination, Starr filed this lawsuit.

56. Brightstar had complied with all conditions precedent to suit and coverage or they have been waived by Starr.

**FIRST CAUSE OF ACTION – BREACH OF CONTRACT –FAILURE TO INDEMNIFY FOR LOSS BY BRIGHTSTAR CORP.**

57. Brightstar repeats and re-alleges each and every allegation set forth in paragraphs one (1) through forty-two (42) of this Counterclaim, as if fully set forth herein.

58. The contract between Brightstar and Starr constitutes a valid and enforceable contract between the parties.

59. The damages claimed by Brightstar fall within the coverage of the policy and there are no exceptions or exclusions which preclude coverage for the loss.

60. In refusing to pay any of Brightstar's losses, Starr conduct constitutes a breach of contract.

61. As a direct and proximate result of Starr's breach of the insurance contract, Brightstar has sustained considerable damages.

62. As a direct and proximate result of Starr's breach of the policy, Brightstar has been forced to retain the services of the undersigned law firm and has agreed to pay it a reasonable fee.

63. As a result, Brightstar is entitled to recover its reasonable attorney's fees and costs.

Wherefore, Defendant, Counter-Plaintiff, Brightstar, requests this Court enter judgment against Plaintiff/Counter-Defendant, Starr, for damages, interests, court costs, reasonable attorney's fees and such other relief the court deems equitable and just.

**SECOND CAUSE OF ACTION – BREACH OF SUE AND LABOR PROVISION BY BRIGHTSTAR CORP.**

64. Brightstar repeats and re-alleges each and every allegation set forth in paragraphs one (1) through 32 of this Counterclaim, as if fully set forth herein.

65. Brightstar sustained a major loss of its merchandise at its German location at the hands of the owner of the warehouse, Getgoods.De.

66. Brightstar was instrumental in getting the German authorities involved and the claim currently lies in the office of a German prosecutor.

67. Brightstar has been obligated to hire and associate with criminal counsel, Daniel Travers of Krause and Kollegen, in Germany in order to ensure that those involved in the theft will be prosecuted, at a substantial cost to Brightstar.

68. In addition, Getgoods.De has filed for insolvency in Germany.

69. Brightstar is also actively involved in the insolvency proceedings in an attempt to mitigate its damages by recouping as much as possible from Getgoods through the insolvency proceedings.

70. To this end, Brightstar has retained Dr. David Georg of Kebekus & Zimmerman to represent it in these proceedings.

71. The policy issued by Starr to Brightstar contains the following provision, in relevant part:

> 42. Sue and Labor:
>
> 42.1 In the case of any imminent or actual loss or misfortune, it shall be lawful and necessary to and for The Insured, its factors, servants and assigns, to sue, labor and travel for, in and about the defense, safeguard and recovery of the goods and/or merchandise and/or property and/or interest insured hereunder, or any part thereof, without prejudice to this insurance.
>
> ***
>
> 42.3 This insurer will pay all such sue and labor expenses subject to the limit of liability set forth elsewhere in this policy.

72. On April 22, 2014, demanded reimbursement for the fees and costs associated with the criminal and bankruptcy proceedings in Germany pursuant to the Sue and Labor Clause of the policy.

73. On April 28, 2014, Starr has refused and/or failed to reimburse Brightstar for the expenses it is entitled to under the subject provision.

74. The expenses claimed by Brightstar fall within the coverage of the policy and there are no exceptions or exclusions which preclude coverage for the loss.

75. In refusing to pay any of Brightstar's losses, Starr conduct constitutes a breach of contract.

76. As a direct and proximate result of Starr's breach of the insurance contract, Brightstar has sustained considerable damages.

77. As a direct and proximate result of Starr's breach of the policy, Brightstar has been forced to retain the services of the undersigned law firm and has agreed to pay it a reasonable fee.

78. As a result, Brightstar is entitled to recover its reasonable attorney's fees and costs.

Wherefore, Defendant, Counter-Plaintiff, Brightstar, requests this Court enter judgment against Plaintiff/Counter-Defendant, Starr, for damages, interests, court costs, reasonable attorney's fees and such other relief the court deems equitable and just.

**THIRD CAUSE OF ACTION – DECLARATORY RELIEF FOR BRIGHTSTAR CORP**

79. Brightstar maintains that the policy provides coverage for the subject loss and Starr has a duty to indemnify it for this loss.

80. Starr maintains that the policy does not provide coverage for the loss.

81. There is also a dispute at to the number of occurrences which took place and the amount of the deductible to be applied.

82. As such, Brightstar and Starr have an actual, present adverse and antagonistic interest in the proceeds of this Policy.

83. Accordingly, there is bona fide actual, present, need for declaration regarding the rights and duties of the parties under this Policy.

84. Furthermore, all of the parties who have an antagonistic and adverse interest in the Policy are all before the court.

WHEREFORE, Counter-Plaintiff Brightstar Corp. seeks this Court's take hold of this action and declare that:

A. Policy Number MASICNY0154US12 is the initial policy applicable to this loss.

B. That the policy issued by Starr to Brightstar provides coverage for the loss and that Starr has a duty to indemnify Brightstar pursuant to the terms of that policy.

C. Brightstar is entitled to recoup the fees and costs associated with this action; and

D. Such other relief as the court deems appropriate and just.

**FOURTH CAUSE OF ACTION – BREACH OF CONTRACT BY BRIGHSTAR GERMANY – FAILURE TO INDEMNIFY**

85. Brightstar Germany realleges paragraph numbers 1 through 42 as if set forth fully herein.

86. Brightstar Germany Gmbh ("Brightstar Germany) is a German corporation which operates exclusively in Germany.

87. Brightstar Germany is a subsidiary of Brightstar Corporation.

88. Brightstar's Germany was formed in January 2013.

89. Brightstar Germany operated exclusively through its Logistic and Distribution with Getgoods.

90. All of the merchandise which was the subject of Brightstar Germany's portfolio was stored exclusively in the subject warehouse owned by Getgoods.

91. Upon formation, the policy issued by Star to Brightstar Corp inured to benefit of Brightstar Germany by virtue of its plain language.

92. Pursuant to the language of the subject policy, Brightstar Germany is an insured under the subject policy independent of and distinct from Brightstar Corporation and has standing to sue in its own right:

> The insurance company signatory hereto by this policy of marine cargo insurance in consideration of premium as agreed does insured Brightstar Corporation and its subsidiary, associated, affiliated and interrelated companies and joint ventures in which it has now or may have a direct or indirect interest and other entities for whom they may have instructions to insure or deem themselves responsible to insure.

93. Starr maintains that the policy of insurance which it issued to Brightstar Germany does not insure the warehouse which is the sole source of Brightstar Germany's operations.

94. Starr's interpretation of the policy would render the warehouse coverage to Brightstar Germany illusory because if the policy does not cover the subject warehouse then it provides coverage for nothing at all as to Brightstar Germany since Brightstar Germany has no other operations.

95. Furthermore, Starr's interpretation of the policy is also inconsistent with the reasonable expectations of the parties since it reasonable for Brightstar Germany to believe that it would not be required to "schedule" its one and only warehouse.

96. Additionally, Starr's interpretation of the policy which would require Brightstar Germany to schedule its one and only warehouse would be useless or futile which is not required by the law.

97. Finally Starr's interpretation would violate public policy which prohibits illusory coverage.

98. The contract between Starr and Brightstar Germany constitutes a valid agreement.

99. The damages claimed by Brightstar Germany fall within the coverage of the policy and there are no exceptions or exclusions which preclude coverage for the loss.

100. In refusing to pay any of Brightstar Germany's losses, Starr's conduct constitutes a breach of contract.

101. As a direct and proximate result of Starr's breach of the insurance contract, Brightstar Germany has sustained considerable damages.

102. As a direct and proximate result of Starr's breach of the policy, Brightstar Germany has been forced to retain the services of the undersigned law firm and has agreed to pay it a reasonable fee.

103. As a result, Brightstar is entitled to recover its reasonable attorney's fees and costs.

Wherefore, Defendant, Counter-Plaintiff, Brightstar, requests this Court enter judgment against Plaintiff/Counter-Defendant, Starr, for damages, interests, court costs, reasonable attorney's fees and such other relief the court deems equitable and just.

**FIFTH CAUSE OF ACTION – DECLARATORY RELIEF FOR BRIGHTSTAR GERMANY**

104. Brightstar Germany realleges paragraph numbers 1 through 42 and paragraphs 57-69 as if set forth fully herein.

105. Brightstar Germany maintains that the policy provides coverage for the subject loss and Starr has a duty to indemnify it for this loss.

106. Starr maintains that the policy does not provide coverage for the loss.

107. There is also a dispute at to the number of occurrences which took place and the amount of the deductible to be applied.

108. As such, Brightstar Germany and Starr have an actual, present adverse and antagonistic interest in the proceeds of this Policy.

109. Accordingly, there is bona fide actual, present, need for declaration regarding the rights and duties of the parties under this Policy.

110. Furthermore, all of the parties who have an antagonistic and adverse interest in the Policy are all before the court.

WHEREFORE, Counter-Plaintiff Brightstar Germany, seeks this Court take hold of this action and declare that:

A. Policy Number MASICNY0154US12 is the initial policy applicable to this loss.

B. The policy issued by Starr provides coverage for the loss and that Starr has a duty to indemnify Brightstar Germany pursuant to the terms of that policy.

C. Brightstar Germany is entitled to recoup the fees and costs associated with this action; and

D. Such other relief as the court deems appropriate and just.

**SIXTH CAUSE OF ACTION – BREACH OF SUE AND LABOR PROVISION BY BRIGHTSTAR GERMANY**

111. Brightstar Germany repeats and re-alleges each and every allegation set forth in paragraphs one (1) through 32 of this Counterclaim, as if fully set forth herein.

112. Brightstar Germany sustained a major loss of its merchandise at its German location at the hands of the owner of the warehouse, Getgoods.De.

113. Brightstar Germany was instrumental in getting the German authorities involved and the claim currently lies in the office of a German prosecutor.

114. Brightstar Germany has been obligated to hire and associate with criminal counsel, Daniel Travers of Krause and Kollegen, in Germany in order to ensure that those involved in the loss will be prosecuted, at a substantial cost to Brightstar.

115. In addition, Getgoods.De has filed for insolvency in Germany.

116. Brightstar Germany is also actively involved in the insolvency proceedings in an attempt to mitigate its damages by recouping as much as possible from Getgoods through the insolvency proceedings.

117. To this end, Brightstar Germany has retained Dr. David Georg of Kebekus & Zimmerman to represent it in these proceedings.

118. The policy issued by Starr to Brightstar Germany contains the following provision, in relevant part:

42. Sue and Labor:

> 42.1 In the case of any imminent or actual loss or misfortune, it shall be lawful and necessary to and for The Insured, its factors, servants and assigns, to sue, labor and travel for, in and about the defense, safeguard and recovery of the goods and/or merchandise and/or property and/or interest insured hereunder, or any part thereof, without prejudice to this insurance.
>
> ***
>
> 42.3 This insurer will pay all such sue and labor expenses subject to the limit of liability set forth elsewhere in this policy.

119. On April 22, 2014, demanded reimbursement for the fees and costs associated with the criminal and bankruptcy proceedings in Germany pursuant to the Sue and Labor Clause of the policy.

120. On April 28, 2014, Starr has refused and/or failed to reimburse Brightstar for the expenses it is entitled to under the subject provision.

121. The expenses claimed by Brightstar fall within the coverage of the policy and there are no exceptions or exclusions which preclude coverage for the loss.

122. In refusing to pay any of Brightstar's losses, Starr conduct constitutes a breach of contract.

123. As a direct and proximate result of Starr's breach of the insurance contract, Brightstar has sustained considerable damages.

124. As a direct and proximate result of Starr's breach of the policy, Brightstar has been forced to retain the services of the undersigned law firm and has agreed to pay it a reasonable fee.

125. As a result, Brightstar is entitled to recover its reasonable attorney's fees and costs.

Wherefore, Defendant, Counter-Plaintiff, Brightstar, requests this Court enter judgment against Plaintiff/Counter-Defendant, Starr, for damages, interests, court costs, reasonable attorney's fees and such other relief the court deems equitable and just.

**DEMAND FOR JURY TRIAL**

Brightstar Corp. demands a trial by jury of all issues so triable as a right.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic and regular U.S. Mail this 28th day of May 2014, to: John A. V. Nicoletti, Esq., Wall Street Plaza, 88 Pine Street, 7th Floor, New York, New York 10005; Email: jnicoletti@nicolettihornig.com

**QUINTAIROS, PRIETO, WOOD & BOYER, P.A.**
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